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Supreme Court of the United States

OCTOBER TERM, 1964.

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No. 355

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 153-194

JOSEPH P. PHELAN, *Plaintiff-Appellant,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

(Continued on Reverse Side of Cover)

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Plaintiffs-Appellants,*

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Defendants-Appellees.*

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, *Plaintiffs-Appellants,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

BRIEF OF RESPONDENT EAGLE CONE CORPORATION IN OPPOSITION TO CERTIORARI.

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against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Defendants-Appellees.*

BRIEF OF RESPONDENT EAGLE CONE CORPORATION IN OPPOSITION TO CERTIORARI.

Statement.

The complaint alleged that the antitrust laws were violated not only by the Carvel franchise system but by the several contracts between Carvel and the supplier defend-

ants, including Eagle Cone Corporation. It charged that by such agreements the supplier defendants refused to sell their products to the franchised dealers; and also that there was a conspiracy among all the defendants to establish an unlawful combination (Eagle Brief in Court of Appeals, p. 3).

The trial judge found that no evidence of any such conspiracy was offered (A-37). He held the contracts with the suppliers valid as exclusive dealing agreements, under the authority of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 and *United States* v. *Columbia Steel*, 334 U. S. 495 (A-38). He found that even if by such contracts the supplier defendants agreed not to sell other than Carvel approved products to the franchised dealers, that would not constitute an illegal boycott since the defendants were not in competition with each other (A-40).

The Court of Appeals also upheld the validity of the supplier agreements under the authority of *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320; *Bascom Launder Corp.* v. *Telecoin Corp.* (2 Cir.), 204 F2 331, and *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F2 418 (D. C. Cir.), cert. den., 355 U. S. 822 (A-18-22).

The petition for certiorari does not point to any legal error in the conclusions reached by said courts, but merely presents to this Court the question of whether said agreements violate the Sherman Act (Petition, p. 3). In view of the settled law sustaining the validity of exclusive dealing contracts, no review of said question should be granted. The validity of the franchise agreement is a matter which concerns only Carvel and its dealers. It is therefore submitted that the dismissal of the complaint as against Eagle Cone Corporation should be held final and not be subjected to further needless review.

POINT 1.

The petition fails to disclose any grounds justifying a review by the Supreme Court.

At page 7 of the Petition, five grounds for review are listed, none of which is a ground recognized by Rule 19 of the Supreme Court Rules.

While franchise systems as such may not have been the subject of a Supreme Court decision, the decisions of the District Court and of the Court of Appeals applied to the issues of this case the doctrines which this Court has promulgated for all commercial activities. Judge Dawson, after summarizing the allegations of the complaint, proceeded to rephrase them "in standard antitrust terminology" (A-32). Both decisions are standard antitrust decisions which present no novel questions of federal law arising from the fact that Carvel was a franchise system.

The decisions of both the District Court and of the Court of Appeals are entirely consistent with the relevant decisions of the Supreme Court (A-10, 11, 18, 23, 24, 25, 26, 28, 36, 38, 44, 45, 46, 47, 48, 55). Said decisions are also consistent with the recent rulings on tying arrangements and exclusive dealing contracts handed down by the Court of Appeals in other circuits (*Baker* v. *Simmons Co.*, (1 Cir.) 307 F2d 458; *Dehydrating Process Co.* v. *A. O. Smith Corp.*, (1 Cir.) 292 F2d 653, cert. den. 368 U. S. 931 (A-26); *Denison Mattress Factory* v. *The Spring-Air Co.*, (5 Cir.), 308 F2d 403 (A-21)).

POINT II.

The courts below did not hold that trademark protection justifies proscribed tying and exclusive dealing contracts.

At page 3 of the petition, under the heading "Questions Presented" there appears: "3. Whether trademark protection justifies proscribed tying and exclusive dealing contracts?" By so phrasing the question, the petitioners imply that the decisions of which review is sought, so held. The concurring opinion of the Court of Appeals clearly recognized that a trademark did not grant to its owner exemption from compliance with the antitrust laws. Thus (A-25):

> "There may, of course, be cases where a trade-mark has acquired such prominence that the coupling of some further item to its license would constitute a per se violation; but such a trade-mark would satisfy the market dominance test of Times-Picayune and Northern Pacific. The figures show that Carvel is not such a mark."

POINT III.

The Supreme Court should not review findings of fact made by the Trial Court and affirmed by the Court of Appeals.

The burden of proof was upon the plaintiffs to prove a per se violation of the antitrust laws. In a treble damage suit "the trier of the facts must be solidly convinced that petitioner has proved his case by a preponderance of the evidence." (*Clark Marine Corporation* v. *Cargell, Inc.*, (D. C. E. D.) Louisiana 1964, 226 F. S. 103, 111). "The proof

should be stronger than in an ordinary civil action" (*Paramount Film Distributors Corp.* v. *Applebaum* (5 Cir.) 217 F2d 101, 105, cert. den. 349 U. S. 961). The Supreme Court has stated that in antitrust cases the scope of review with respect to issues of fact is quite narrow (*Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 446; *United States* v. *Oregon Medical Society,* 343 U. S. 326; *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U. S. 377, 381).

The petition points to no evidence in the record which would sustain a conclusion that the findings of the courts below are "clearly erroneous" (*United States* v. *United States Gypsum Co.,* 333 U. S. 364, 394). As stated in *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 340-341:

> "The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reason for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations. . . ."

The Court of Appeals examined the tying arrangement in the manner required by the decision in *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 6, in order to determine whether there was "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" and "whether a not insubstantial amount of commerce is affected" (A-11, 23). The concurring opinion probed the uncontradicted evidence on such issues and found that in the tri-state area the 250 Carvel dealers constituted one-fifth of 1% of the ice cream outlets and were apparently doing 1% of the business. The sales of ice cream cones by Eagle to Carvel constituted 1% of its total sales of cones in said area. In competition with Carvel were many other similarly operating chains (A-23-24).

The foregoing evidence was presented by the plaintiffs themselves. They adopted as their exhibit an affidavit which Eagle had submitted in a summary judgment motion and which contained the relevant market data (Eagle Appendix in Court of Appeals 14e-20e). From such evidence only one possible finding could be made, namely: "Not only was the amount of commerce in these not consequential, but any damage to the plaintiffs was even less so" (A-24). The concurring opinion then found that though Carvel's mark-up on the cones was 5%, it charged its dealers a lower price than they could have obtained had they bought in smaller quantities (A-25).

The concurring opinion also found as a fact that Carvel was not required to supply the dealers with specifications for substitute products (A-26-27). The majority of the Court held that the record afforded no basis for upsetting the factual findings of Judge Dawson that it would impose an unreasonable burden to require Carvel to limit itself to advance specifications (A-26). Referring to Vettel's testimony in respect of flavorings of uniform quality, the concurring opinion held that his position "was sufficiently reasonable and persuasive that the judge was entitled to credit it, whether or not one of us would agree" (A-27).

The identical conclusion was reached by the Court of Appeals of the Fifth Circuit in *Dennison Mattress Factory* v. *Spring Air Co.*, 308 F2d 403, a case where the licensees of the Spring-Air trademarked mattress were required to purchase from designated sources all their products and supplies including ticking, innerspring units and labels. The Court held (p. 410):

> "The trademark would be of no worth unless the public could be sure that every mattress which bore that mark was uniform both in exterior design and interior quality. Dennison must accept the judg-

ment of Spring-Air in this requirement. . . : It is doubtful that every tie-in device is unlawful (*Dehydrating Process Co.* v. *Smith*, 292 F2d 653(1)).''

Conclusion.

It is respectfully submitted that the petition for certiorari should be denied with respect to Eagle Cone Corporation.

Respectfully submitted,

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